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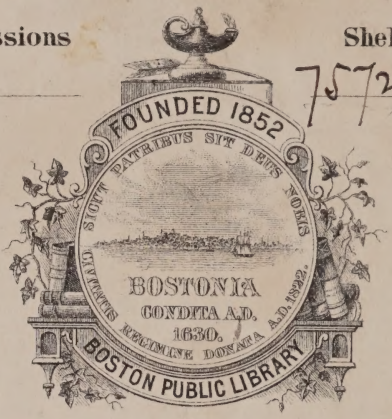


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Wm. E. Perkins Esq. Dup.

With Regards of Chas. Theo. Russell Jr.

54 Devonshire St.

THE

# DISFRANCHISEMENT OF PAUPERS.

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## EXAMINATION OF THE LAW OF MASSACHUSETTS.

BY

CHARLES THEO. RUSSELL, JR.

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BOSTON:
LITTLE, BROWN, AND COMPANY.
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# THE DISFRANCHISEMENT OF PAUPERS.

During the last few years, owing to the depression in business and "hard times," thousands of persons have been thrown out of employment, and become more or less dependent upon public and private charity. This fact has called closer attention to the provisions of the State Constitution regarding the qualifications of voters, and to the exception to the right of voting contained in it, — of "paupers and persons under guardianship." The question has been raised, and is yet unsettled, how far such persons by the receipt of such public assistance have brought themselves within this exception, and disqualified themselves as voters. This question has been much discussed in political circles, perhaps with more warmth than accuracy, while earnest and repeated requests have been made to boards of mayor and aldermen and selectmen in many of the cities and towns, to omit from the voting-lists the names of all persons, who have within one year received aid and assistance from the city or town authorities.

At the last session of the Legislature, a nearly successful attempt was made to enact some such provision, and oblige or authorize the boards of registration to take such action. The Judiciary Committee of the House reported a bill, providing that the overseers of

the poor should annually, before the election, return to the mayor and aldermen or selectmen of each city or town, a list of all male persons over twenty-one years of age, who have within the year received public aid and assistance in said city or town: "And the said mayor and aldermen and selectmen shall thereupon give notice to the persons whose names are so returned, and fix a reasonable time and place (prior to the election) at which they may show cause why they should not be included in the exception as to voters in Section 1 of Chapter 376 of Acts of 1874 (paupers and persons under guardianship); and if they are found not to come within said exception, their names shall be entered upon the list of voters of the respective towns in which they dwell, if otherwise qualified to vote."

After a long debate this bill passed its third reading by the casting vote of the speaker, but was afterwards (the question of its constitutionality being raised) recommitted. The committee reported a modified bill, entitled, "An Act requiring the Overseers of the Poor to make certain Returns"; which merely provided that such overseers should make return of names of the persons as provided in the previous bill, simply adding that "nothing herein shall be construed to take away the right to vote of any person entitled thereto." This latter bill, except in so far as it could be taken as a legislative *hint* and authority to the proper officers of registration to act upon such returns, and omit from the voting-lists the names so returned, was harmless and unnecessary.

The bill passed the House in this form, and was rejected by the Senate, upon an adverse report of the Senate Judiciary Committee. The subject, being open, has again come before the Legislature.

Before any measure of this kind — which is intended, and will operate, to disfranchise, at least *prima facie*, a large class of persons in the community — is enacted into law, the matter should be carefully considered, and both the constitutionality and expediency of the act clearly established.

Without examining the wider question of the need or expediency of such legislative action, it may be well to inquire generally, without regard to any specific measure, how far, under the Constitution, the Legislature can deprive or authorize others to deprive of the right of suffrage, persons who within any given period have been the recipients of public aid and charity.

The constitutional history of the Commonwealth shows how carefully the State has always guarded the qualifications of voters, — never, since the Royal Charter of 1691, leaving those qualifications to be fixed or altered by annually changing legislative bodies, which are always liable to be controlled by temporary and political influences.

The old Colony Charter of 1628 provided that, "On the last Wednesday in Easter term yearly, the governor and all other officers of the company shall be in the general court or assembly to be held for that day or time, newly chosen for the year ensuing, by such greater part of the said company, for the time being then and there present," the general court having power to appoint "such and so many others as they shall see fit, and shall be willing to accept the same, to be free of the said company and body, and them into the same to admit."

Under this charter the general court, in 1641, declared it "to be the constant liberty of the freemen of this jurisdiction to choose yearly at the court of elec-

tion, out of the freemen, all the general officers of this jurisdiction," having previously (1631) provided that "no man shall be admitted to the freedom of this Commonwealth but such as are members of some of the churches within the limits of this jurisdiction." In 1663, "all persons, Quakers or others, which refuse to attend upon the public worship of God here established," were disfranchised, "during their obstinate persisting in such wicked ways and courses, and until certificate be given of their reformation." In 1665, in unwilling response to the demands of the King, that church membership should no longer be a requisite to admission as freemen, the general court made some changes in the law, providing that all Englishmen presenting certificates of the ministers of the places where they dwell, that "they are orthodox in religion, and not vicious in their lives," may, if they possess a certain amount of property, "be propounded and put to vote in the general court for acceptance to the freedom of the body politick."

The Royal Charter for the Province, granted in 1691, expressly defined and limited the qualifications of voters: —

"No freeholder or other person shall have a vote in the election of members to serve in any great and general court, who, at the time of such election, shall not have an estate of freehold in land within our said province or territory, to the value of forty shillings per annum at the least, or other estate to the value of forty pounds sterling."

And it will be found that in all acts relating to elections in the Province, — passed after the granting of this charter, care was taken to leave unchanged the qualifications named, — the right of suffrage being always reserved "to those qualified by charter to vote."

In 1780 the present Constitution was adopted. The provision in regard to electors (changed in 1820) was as follows: —

"Every male inhabitant of twenty-one years of age and upwards, having a freehold estate within this Commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for Senators. To remove all doubt concerning the meaning of the word 'inhabitant' in this Constitution, every person shall be considered as an inhabitant for the purpose of electing or being elected into any office or place within the State, in that town, district,or plantation, where he dwelleth or hath his home."

It is evident that the framers of this clause, by so carefully defining the word "inhabitant," did not mean any term used should require future construction either by Court or Legislature.

The Constitution required the same qualifications of voters for Representatives, — except the words, "resident in the town for one year preceding the election," were used in place of the word, "inhabitant." Those qualified to vote for Senators and Representatives could vote for the other State officers.

These provisions remained the fundamental law of Massachusetts until 1820, when the Convention on the revision of the Constitution, after a long debate and by a close vote, abolished the property qualification, and agreed to the present third amendment, which was ratified by the people: —

"Every male citizen of twenty-one years of age and upwards (excepting paupers and persons under guardianship), who shall have resided within the Commonwealth one year, and within the town or district in which he may claim a right to vote six calendar months, next preceding any election of Governor, Lieutenant-Governor, Senators, or Representatives, and

who shall have paid by himself, or his parent, master, or guardian, any State or County tax, which shall, within two years next preceding such election, have been assessed upon him, in any town or district of this Commonwealth; — and also every citizen who shall be by law exempted from taxation, and who shall be in all other respects qualified as above mentioned, shall have a right to vote in such election of Governor, Lieutenant-Governor, Senators, and Representatives; — and no other person shall be entitled to vote in such elections." *

In 1857, a further amendment (Art. XX.) was adopted: —

"No person shall have the right to vote, or be eligible to office, under the Constitution of this Commonwealth, who shall not be able to read the Constitution in the English language and write his name; — *provided however* that the provisions of this amendment shall not apply to any person prevented by a physical disability from complying with its requisitions, nor to any person who now has the right to vote, nor to any person who shall be sixty years of age or upwards at the time this amendment shall take effect."

These are the qualifications now required of all electors in this Commonwealth.†

It will be seen that all the qualifications for voters are definitely fixed and limited by the Constitution itself. They are clear and precise; — all of them must

* In the draft of a new Constitution adopted by the Convention of 1853, the requirement of the payment of a tax was, after a long debate, abolished. The Constitution was rejected by the popular vote.

† In but few of the States are paupers, as such, excluded from the right of suffrage. In Maine and Massachusetts, "paupers and persons under guardianship" are excepted; in New Jersey, "no pauper, idiot, insane person"; in Delaware, "no idiot, insane person, or pauper"; in West Virginia, "no person who is a minor, or of unsound mind, or a pauper"; in South Carolina, "no person while kept in an almshouse," can vote. These are the only States in whose constitutions the word "pauper" is used as a word of disqualification. In Rhode Island and Connecticut a property qualification is required.

exist as prerequisites to the right to vote; and whoever possesses them has the right vested in him by the Constitution. Such a person "shall have the right to vote." The Constitution nowhere gives to any body, legislative, judicial, or executive, any right to provide additional, or alter present, qualifications. The power conferred upon the Legislature is to make, ordain, and establish "all manner of wholesome and reasonable orders, laws, statutes . . . . so as the same be not repugnant or contrary to this Constitution." Statute law must necessarily be subordinate to the provisions of the Constitution, and no legislative enactment can in any way change or increase these qualifications, or deprive any person of the right of suffrage vested in him by the Constitution. Any such enactment would be unconstitutional and void.

"The qualifications for voters are prescribed by the Constitution, and cannot therefore be altered or modified by law," says Chief Justice Shaw, 5 Met. 301.

This principle is too well settled to be doubted. The law is stated by Judge Cooley: —

"When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland (Thomas *v.* Owens, 4 Md. 189), that where the Constitution defined the qualifications of an officer, it was not in the power of the Legislature to change or superadd to them, unless the power to do so was expressly or by necessary implication conferred by the Constitution itself." — *Constitutional Limitations*, p. 64.

"The Legislature of a State cannot add to the qualifications of an elector as prescribed by the State Constitution. Where the Constitution prescribes the qualifications, whoever pos-

sesses them has a constitutional right to vote, and of this right he cannot be deprived by legislative enactment." — McCrary, *Law of Elections*, § 5.

The Courts in this country, following this principle of law, have always carefully guarded the right of suffrage as fixed in the different State Constitutions, and have ever been jealous of any legislative interference with it. Frequent attempts have been made in different States, generally in order to gain some political advantage for the party in power, to limit or extend the right of suffrage, notwithstanding the provisions of the Constitution. The Courts have therefore been repeatedly called upon to pass upon such acts, and define the exact power of the Legislature, under the Constitution, in the premises. We refer to a few of these cases.

In Rison *v.* Farr, 24 Ark. 161, the Court held that an act of the Legislature requiring a "test oath" from voters added a new qualification, and was therefore unconstitutional, — Chief Justice Yonley saying: —

"The right of those having the constitutional qualifications to vote is founded in the fundamental law of the land, and cannot be legislated away. The right of suffrage in this State, if not an *inherent*, is at least a constitutional right, and whoever possesses the required qualification cannot be restrained from the exercise of that right except by the alteration of the Constitution, and any law infringing upon that right as vested by the Constitution is null and void."

In St. Joseph &c. R. R. Co. *v.* Buchanan County Court, 39 Mo. 485, the Supreme Court of Missouri held that a law providing that certain acts should be submitted to a vote of "*taxable* inhabitants of a county," the Constitution containing no such restriction upon voters, was unconstitutional.

So in State *v.* Williams, 5 Wisc. 308, the Wisconsin Court decided that a law, requiring thirty days' previous residence in the place before voting, was inconsistent with the qualifications prescribed by the Constitution, and void.

State *v.* Staten, 6 Cold. 233, tested the constitutionality of an act of the Tennessee Legislature, authorizing the governor, in certain cases of violence, fraud, etc., to set aside and annul the registration of voters. The Court declared the act an unconstitutional interference with the right of suffrage, saying: —

"The elective franchise is a right which the law protects and enforces as jealously as it does property in chattels or lands. It matters not by what name it is designated. . . . . The person, who under the Constitution and laws of the State is entitled to it, has a property in it, which the law maintains and vindicates, as vigorously as it does any right of any kind which men may have and enjoy. The rules of law which guard against deprivation or injury the rights of persons in corporeal properties, are alike, and equally applicable to the elective franchise, and alike and equally guard persons invested with it, against deprivation of, or injury to it. Persons invested with it cannot be deprived of it otherwise than by due process of law. . . . . The 'due process of law' by which a person may be deprived of his franchise is not an act of the Legislature, or any act of executive power, or a proceeding in court other than a proceeding where the party whose right is involved can have a hearing and make defence."

In the elaborate opinion of the Judges of the Connecticut Supreme Court, 30 Conn. 591, upon the constitutionality of the act allowing soldiers to vote outside of the State, they decided the act inconsistent with the required qualifications named in the Constitution. The Court in Vermont, 37 Vt. 665, in California, 31 Cal.

261, and in Pennsylvania, held similar acts unconstitutional.*

The Supreme Court of Indiana in Quinn *v.* State, 35 Ind. 485, decided unconstitutional an act requiring residence for a certain period before election, the time being otherwise fixed by the Constitution.

In Barker *v.* the People, 20 Johns. (N. Y.) 457, the Court held that the Legislature could not pass an act disfranchising any person convicted of sending a challenge to fight a duel; the Constitution gave the Legisture the right to pass laws disfranchising persons convicted of "infamous" crimes; but duelling was not such an "infamous" crime.

An important case, McCafferty *v.* Guyer, 59 Penn. St. 109, arose in Pennsylvania in 1868, under an act of the assembly providing that no deserter from the army should vote at any election. It was held that the act violated the Constitution of the State by providing a new qualification.

Judge Strong (now of the U. S. Supreme Court), in giving the opinion of the Court, said: —

"It attempts to disfranchise those who are enfranchised by the fundamental law of the Commonwealth, and it enacts what shall be the evidence of disfranchisement. It is not, it does not, profess to be, a regulation of the mode of exercise of the right to an elective franchise. It is a deprivation of the right itself. Can then the Legislature take away from the elector his right to vote, while he possesses all the qualifications required by the Constitution? . . . . If so, the legislative power is superior to the organic law of the State, and the Legislature, instead of being controlled by it, may mould the Constitution at their pleasure. Such is not the law. A right conferred by

* *But* see *contra*, Opinion of Judges of New Hampshire, 45 N. H. 595; Lehman *v.* McBride, 15 Ohio St. 573; Chandler *v.* Muire, 16 Wisc. 398.

the Constitution is beyond the reach of legislative interference. . . . . It is in the nature of a constitutional grant of power or of privileges, that it cannot be taken away by any authority known to the government. It involves a prohibition of interference with it." *

The Legislature clearly cannot by direct enactment alter the qualifications fixed by the Constitution. What it cannot do directly, it cannot do indirectly. If it has no power to take away the right of suffrage, it has none to define it away or unreasonably to abridge or impede its enjoyment. It can no more make or declare an arbitrary definition of a term used in the Constitution than it can annul or amend its provisions. Such a definition is an amendment. By a forced legislative construction, — a restricted or widened interpretation, according to circumstances, — the Constitution in effect is altered by statute law, and so becomes mere plastic clay in the hands of legislative potters. For instance, if the Legislature can say that the word "pauper," as used in the Constitution, shall mean "a person who has within a year received public assistance," it can say that the word shall mean "a person worth less than $ 500 or $ 200," and so in effect restore the abolished property qualification for voters! It is hard to conceive that any legislator can be of opinion that a citizen qualified under the Constitution to vote can be made a "pauper," and so disqualified, by coming within an arbitrary legislative definition of the word.

It will be conceded that the construction and interpretation of the Constitution are for the Court to settle.

* And see also to the same effect and affirming the above cases, Davis *v.* School District, 44 N. H. 398; Randolph *v.* Good, 3 W. Vir. 551; Clayton *v.* Harris, 7 Nevada 64; People *v.* Gordon, 5 Cal. 235; Spagins *v.* Houghton, 3 Ill. 377; Morrison *v.* Springer, 15 Iowa 304; State *v.* Symonds, 57 Me. 148; Page *v.* Hardin, 8 B. Mon. 648.

This conceded power in the Court must necessarily include the power of defining the meaning and intention of all words used in the instrument. The right of suffrage and qualifications of voters, as given by it, must be determined by the Court, and all legislative enactments interfering with that right and those qualifications, when brought to the test of constitutionality, will come under judicial revision. Any declaratory act of the Legislature, defining the meaning and intention, not of the statute or common law, but of a constitutional provision, is utterly void so far as it fails to conform to the higher and authoritative construction of the Court. It is important then to see, by reference to the decisions of the Court, how far the Legislature can constitutionally take action upon this mooted question.

In the first place, the Legislature has the power to make any reasonable, just, and impartial regulation of the mode of exercising the right of suffrage; — the *right itself* is vested and limited by the Constitution; — *the mode of exercising it* is left to statute provision. But such statute cannot, under the form of being merely regulative, abridge or take away the right itself, because, as we have seen, between the Legislative act and the legal voter, no matter who he is, the constitutional provision stands as a bulwark for the protection of his right of suffrage. The Legislature can regulate, it cannot destroy it. The distinction between the *right*, and the reasonable regulation of its exercise, has been declared by our Supreme Court.

In Capen *v.* Foster, 12 Pick. 485, the Court passed upon the constitutionality of the provision, in the Act of 1821, ch. 110, — establishing the City of Boston, — that the mayor and aldermen should before every election

prepare lists of all qualified voters, which lists should be used at such election, and no person should vote whose name was not upon the lists. The plaintiff, a duly qualified elector, whose name had been omitted, after being refused the right of voting, brought this action, and contended that the provision in question prescribed a new qualification for voters, and, as such, operated as a restraint upon the privileges granted by the Constitution, and was illegal. The Court decided that this provision did not prescribe a new qualification, but was merely a reasonable and necessary regulation of the exercise of the right of voting.

In the elaborate opinion given by Chief Justice Shaw, he says:—

"This Court is of opinion that in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any *reasonable* and *uniform* regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right in a prompt, orderly, and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself. . . . . The Constitution fixed the qualifications of voters with precision, and left all the rest to be regulated by law. . . . . If then the Constitution has made no provision in regard to the time, place, and manner in which such examination shall be had, and yet such examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects, respecting the mode of exercising the right, in relation to which it is competent to the Legislature to make suitable and reasonable regulations, not calculated to defeat or impair

the right of voting, but rather to facilitate and secure the exercise of that right." *

It will be seen the regulation must be "reasonable," "uniform," and "not impair the right of voting," — or it will be unconstitutional. It cannot provide certain requirements of one class in the community, and exempt all others. All persons qualified by the Constition to vote must stand upon a perfect equality. The obvious defect in law of any act providing that certain persons, viz. those who have received public assistance within a given period, shall be *prima facie* regarded as disqualified, and obliged to make proofs not required of others, is, that such act is not uniform, does not apply to all alike, and therefore fails to come within the powers of the Legislature. If such persons are "paupers," it is unnecessary to provide that they shall be *prima facie* disqualified, and obliged to prove qualifications; for they are conclusively disqualified by the Constitution itself; if such persons are not "paupers," they stand on the same ground as all other persons, and cannot legally be treated in any different manner, or put to greater inconvenience or proof, in registration. If an act, providing that the names of all such persons shall not be put upon the voting-lists, when other names are entered, is just and constitutional, equally so would be an act requiring the officers of registration to omit from the lists the names of all persons, who have resided in the town or city only five years, and to restore them only on proof of the constitutional

* This decision has been followed and affirmed in Waite *v.* Woodward, 10 Cush. 143; Harris *v.* Whitcomb, 4 Gray 433; Edmunds *v.* Banbury, 28 Iowa 267; Anderson *v.* Baker, 23 Md. 531; People *v.* Koppelcorn, 16 Mich. 342; State *v.* Dean, 9 Wisc. 279; Byles *v.* Asher, 47 Ill. 101; and in all text-books treating of this subject.

qualification as to residence; or an act, that the names of all persons under thirty years of age shall be omitted, until they make due proof of age.

In 1868 the Supreme Court of Ohio was called upon to decide the precise question here involved. Munroe *v.* Collins, 17 Ohio St. 665. The Constitution gave the right of suffrage to "white male citizens." The Court had decided that persons of mixed race, having a preponderance of white blood, were "white men," within its meaning. The Legislature then passed an act, providing that judges of elections should challenge every person offering to vote who had any admixture of African blood; that the person so challenged should then be required to prove by two witnesses that he had a preponderance of white blood in his veins, and, failing to prove that, his vote was to be rejected. The Court decided the act unconstitutional, because, though passed professedly to regulate the exercise of the right of voting, it was not reasonable, uniform, and impartial, but made an unjust discrimination.

In its opinion the Court, after referring to the test applied in Capen *v.* Foster, *supra*, says: —

"Tried by this rule, what is the character of the law in question? Is it unreasonable, partial, or calculated to subvert or impede the exercise of the right of suffrage by the class of voters to whom it applies? Is it clearly such? We are unanimous in the opinion that it is, and that it has all these unconstitutional elements combined. . . . . The effect of the law is to impede the exercise of the right of suffrage by the class of voters referred to, and to a great extent to deny the right, and that its operation would be partial and unjust to an extreme degree, any candid man has only to read the law to admit. The law is partial and calculated to impede the right of suffrage by imposing upon the class of voters referred to unreasonable burdens of proof, and limitations, as to kind and

amount of evidence, which are not imposed upon other voters. They are challenged, nay, *must be* challenged, — not because they are not in law white men, but because of their visible admixture. If they are *prima facie* white men, or even, as in the case at bar, are plainly and clearly white men, the burden of proof, contrary to all rules of evidence, is cast upon them nevertheless. . . . . For these reasons and others apparent upon the face of the act it is manifest to us that it cannot be supported as a law to facilitate and protect the right of suffrage, and to regulate its exercise, within the scope of legislative power. Its manifest tendency and effect are to subvert instead of protect the right of suffrage, and to impede, instead of facilitate, its exercise in a particular class of voters. If it acknowledges their right at all, it does so grudgingly and by mere implication. . . . . It therefore lacks that element of fairness and impartiality which should characterize all laws of that description. Under its provisions, fully carried out, not one perhaps in ten of the class proscribed by it could exercise the right of voting. It presents them with difficulties and impediments at every step, such that, if they are not absolutely insurmountable, a quiet, peace-loving citizen in most cases would choose to relinquish his right to vote rather than encounter them."

This language fitly describes the contemplated act of the Legislature, disqualifying *prima facie* all recipients within a year of public charity. So far as such act pretends to be regulative, it contains this essential defect, and is unconstitutional. "A registry act," says Mr. McCrary, "Law of Elections," § 8, "which should impose upon a particular class of citizens conditions and requirements not required of others would be void." But the legislation desired is hardly claimed to be an act of regulation of the manner of voting. It relates to the qualifications of voters, and is intended to disfranchise a certain class in the community. This, as we have seen, it cannot do if it in any way, directly or

indirectly, alters the constitutional qualifications; if, however, it conforms to the constitutional provision, such act, although unnecessary, would be properly within the power of the Legislature; and whether it alters or conforms to these prescribed qualifications depends upon two questions: —

1. What is a "pauper"?

2. When must a person be a pauper to come within the constitutional exception?

## I. What is a "Pauper"?

Being a term used in the Constitution, its meaning, as a question of construction, is for the Supreme Court. And that Court has clearly and precisely defined the word.

In the opinion of the Justices, given to the Senate in 1832, 11 Pick. 538, in answer to the question whether persons who were exempted from taxation by the assessors, under the discretionary powers given them by the statute, were qualified voters, the Court says, —

"In a certain loose and indefinite sense, the persons in question may be called paupers. The case supposes them to be poor, and in consequence thereof, to be unable to contribute towards the public charges. But we are of opinion that this is not the sense in which the word is intended in the Constitution. Long before the adoption of the article in question, the word "*paupers*" had acquired a precise and technical meaning, and was understood to designate *persons receiving aid and assistance from the public, under the provisions made by law for the support and maintenance of the poor.* Such provisions had been made both in England and in this country, long before the adoption of this article, or of the original Constitution. Besides, if it were intended to be understood in a more general sense, and as extending to all *poor persons*, it might

go to exclude those from voting whose poverty might be manifested in other modes than the one set forth in the extract from the tax act. Considering how important it has always been regarded in the framing of fundamental laws, upon which the essential civil and political rights and privileges of the subject mainly depend, that words should be used in a sense as exact and definite as the nature of language will permit, and how careful the framers of our Constitution have been in the observance of this rule; and considering upon how indefinite and uncertain a basis, the important right of voting would have stood, had the word 'paupers' been used in any other than the exact and technical sense which we have ascribed to it, our opinion is confirmed, that it was intended to be confined to *persons claiming assistance for themselves or families from the provision made by law for the poor.*"

The Court was therefore of opinion that persons, so relieved from taxation, could not be excluded from right of voting as *paupers;* but came under the disqualification of not having paid taxes within the required time.

The definition thus given by the Court has always been followed in this State, and repeatedly affirmed and acted upon by the Courts.

Thus, the test in Wilson *v.* Brooks, 14 Pick. 341, of whether a person was a pauper, was given: "Was he *actually chargeable* to the town? — or did he stand in need of immediate relief?"

"Necessity of immediate public relief constitutes a pauper." Sturbridge *v.* Holland, 11 Pick. 459; Fiske *v.* Lincoln, 19 Ib. 473; Oakham *v.* Sutton, 13 Met. 192; New Bedford *v.* Chace, 5 Gray 28.

"Aid and assistance furnished by public authority, and according to law to the child or wife of any person liable for such support, in present need of relief. . . . or furnished to the party himself, — *for the time during*

*which they are furnished,* — render the person a pauper." Shaw, C. J., in Charlestown *v.* Groveland, 15 Gray 15. In Hutchins *v.* Thompson, 10 Cush. 239, Mr. Justice Metcalf says: "The amendment to the Constitution, which prohibits paupers from voting in certain elections, does not apply to all persons who receive or need relief, *but only to persons receiving aid and assistance from the public.* That such was the meaning of the word 'pauper' in that amendment we cannot doubt."

The word as used in the Constitution has then a *technical* meaning. "Where technical words are used, the technical meaning is to be applied to them," Story, Constitution, § 453. And that meaning is a person *receiving* (not who has at any time received) aid and assistance from the public. A person *receiving* such assistance is not a qualified voter; a person, who has at some previous period received aid, is not necessarily disqualified.

## II. When must a Person be a "Pauper" to come within the Disqualification?

Clearly, we think, at the time of election, or perhaps after the decision in Capen *v.* Foster, *supra,* at the time the lists of voters are prepared.

Qualifications of voters must necessarily relate to, and be regarded as of, the time when the right requiring the qualifications is exercised. When the Constitution requires certain qualifications for voters, there is no implication that such qualifications must exist, not only at the time of voting, but for a certain period before. There is certainly no express provision requiring such previous existence of qualifications; if any is *implied,* then by implication we in effect extend

and amend the expressly and clearly limited requirements of the Constitution, and so make new qualifications.

That the qualifications are considered as existing at the time of election appears from an examination of the provision of the Constitution.

Thus it is required that the person must be twenty-one years of age and upwards. When? Clearly when he offers to vote or to register. So he must be able to read the Constitution and write his name. If he can do this when he offers to register, can any previous disability prevent his registering? He must also have paid a tax "within two years *next preceding such election*," and must have resided within the Commonwealth one year, and within the town or district six calendar months, "*next preceding any election*," to have right to vote *at such election*." That these qualifications relate to the time of election will probably be conceded. The Court has always assumed the fact. See Humphrey *v.* Kingman, 5 Met. 163; Williams *v.* Whiting, 11 Mass. 424; and Putnam *v.* Johnson, 10 Ib. 488.

The case of Bridge *v.* Lincoln, 14 Mass. 367, seems conclusive upon the point, holding that if the qualifications exist at the time of election no previous disqualification can bar the right to vote.

The case arose under the old property qualification requirement. The plaintiff, *on the morning of election day*, received $200, being in advance of his yearly salary of $500; without the possession of this sum he had not the property qualification. After receiving it he offered his vote at the election, and it was refused. In an action against the selectmen of Worcester for refusing to receive his vote, it was held that he was a qualified voter when he offered to vote, and could re-

cover, — "that the true intent and meaning of the Constitution is, that every man, who is in possession of the requisite estate, claiming it as his own, and having the lawful right to dispose of it, shall be entitled to the franchise." (Parker, C. J.)

The cases, where actions have been brought by persons deprived of their right to vote, support this conclusion.

In the leading case of Blanchard *v.* Stearns, 5 Met. 298, Chief Justice Shaw decided as requisite to maintaining such actions, that plaintiff must show not only that he had the required qualifications of a voter, *when he offered to vote*, but also that he produced and submitted to the selectmen sufficient proof of that fact. He says: —

> "The law imposes upon the claimant the duty of preparing and exhibiting the evidence of his title. . . . . And the question will be for the jury, upon such issue, whether the claimant, whose vote was rejected, *was at the time possessed of the qualifications entitling him to vote;* whether he seasonably submitted the proof of those qualifications to the selectmen, and requested his name to be placed upon the lists; and whether those proofs were sufficient (in the opinion of the jury) to warrant and require them so to do."

The elaborate opinion from which this language is taken assumes that the qualifications exist at the time the privilege is claimed, without regard to the previous position of the claimant.

The case has been followed and affirmed in Bacon *v.* Benchley, 2 Cush. 100; Waite *v.* Woodward, 10 Cush. 143; Harris *v.* Whitcomb, 4 Gray 433; Lombard *v.* Oliver, 3 All. 1, and 7 All. 155.

The exception in the Constitution to the right of voting, is, "excepting paupers and persons under guar-

dianship." When then must persons be under guardianship to come within this exception? It must be at the time when they claim the right. A person not under guardianship, if released from guardianship only the day before, if otherwise qualified, can vote. Any other construction of this provision, any attempt of the Legislature to say that any one, who had been under guardianship during the year next preceding the election, should be disqualified, would be wrong and absurd. Precisely the same reasoning applies to the other excluded class, — "paupers." If a person is receiving public assistance at the time he offers to vote, he is disqualified; if he is not receiving public assistance at that time, if otherwise qualified, he can vote; and no inquiry into his past poverty or dependence, no search among the records of the overseers of the poor, however authorized or required by statute, can deprive him of his constitutional right. Any enactment, making the proposed disqualification, is a clear extension of the disqualification fixed by the Constitution. The Constitution simply disqualifies "paupers"; such an act would disqualify not only "*paupers*," but *persons who within a given period have been such.* If the Legislature can fix such period at *one year* before election, it is hard to see why the Legislature cannot fix it at five or ten years, or a lifetime, and disqualify for life any person who has ever been aided at the public expense. Such enactment in effect creates *constructive pauperism* for the purpose of disqualifying voters, and is as objectionable in point of law as the acts making "constructive treason" in England, which were passed in the last century, — apologized for by Pitt, under plea of necessity, and loudly protested against by Fox and the Liberals. Our State Constitution does not deal with "*constructive*

paupers"; its language is too precise, and the construction given it by the Court too clear to admit of doubt.

If then the Constitution provides that no pauper shall vote, a person to lose the right must be a "pauper" at the time he seeks to exercise it. If not a pauper then, the disqualification does not attach to him, and no legislative enactment, by extending the meaning of a word, can fix that disqualification upon him. The fact that a person has, at some time during the year, received public aid, does not *ipso facto* establish that he is, at the time of registration, a pauper; he is a pauper only so long as he is receiving such aid. As has been seen, the language of the court is that a pauper is "a person *receiving* such public aid"; that "*immediate necessity* for public aid" makes a person a pauper; the Court regarding the word as defining a *present, and not a past condition.* See Stow *v.* Sawyer, 3 All. 515; New Bedford *v.* Chace, 5 Gray 28; Choate *v.* Rochester, 13 Gray 92; Taunton *v.* Middleborough, 12 Met. 35.

Looking at the decisions under the statutes relating to the settlement and support of paupers, we find the same principle laid down.

In the case of Wilson *v.* Brooks, 14 Pick. 341, the Court held that when a person, who had been supported as a pauper fifteen years, regained sufficient bodily health, though of weak mind, to be able to support himself, and had found employment, such person was no longer a pauper, and the town had no longer any claim upon his services.

The language of the Court is instructive: —

"The rights and duties of towns and paupers are correlative; — while the town supports the pauper, the pauper is bound to labor for the town. *But when the support becomes unnecessary, the right to control the labor ceases.* It may happen

that a pauper, by the acquisition of property by gift, devise, or descent, may be raised from poverty and dependence. In such case, can it be pretended, that he may be retained the unwilling tenant of an almshouse, and be compelled to labor for whomsoever the town or its agent may direct? The town may claim a reimbursement for the support furnished, but can have no further legal claim to his services. . . . . Is Bragg during any portion of the time mentioned to be deemed a pauper? Was he actually chargeable to the town, or did he stand in need of immediate relief? . . . . He had been treated as a pauper, and labored for the town many, perhaps too many, years. But he had bodily health and strength. . . . . He was willing to labor for the defendant, and the defendant was willing to employ and to pay him wages, besides supplying him with all necessary food and clothing. Can such a person be considered a pauper? We think not."

Can it be pretended that, after the support became unnecessary, the town could any more deprive him of his right to vote, than of his right to labor for whom he pleased? Did not his right of suffrage, suspended during his dependence upon the town, immediately revive and exist when the dependence ceased? The reasoning of the Court is clear and conclusive. A person has for years been supported by the town; in October he inherits a fortune and becomes independent; or during the year his child has been sick, and he has become dependent upon the public for its medical treatment and care; then the child dies, and the father is relieved from his dependence; or in another case, he has been himself temporarily sick or out of work, and so required public aid for a time; and afterwards recovers his health, or receives employment, and becomes again self-supporting; — in any of these cases can it be maintained that, after the dependence upon the public ceases, the disqualifications imposed by the Constitu-

tion on account of such dependence still continues? If so, how long must it continue? when does it cease? and who is to decide that fact? And yet the proposed legislation disqualifies, *prima facie* at least, a person who has been in any of those situations during the year before election, without any regard to his present condition.

The case of Reidell *v.* Morse, 19 Pick. 358, arose under the statute provision, allowing overseers of the poor to bind out, as apprentices, children of persons chargeable to the town. The action was brought by the father for the services of the minor son. The defendant pleaded the indenture made by him with the overseers, by which the son had been bound to him as an apprentice. The plaintiff replied that he was not chargeable to the town when the indenture was made, and that therefore the overseers had no authority to make it, and it was void. It appeared that the plaintiff and his wife had received some assistance from the town, but not at the time indenture was made, — in fact, at that date he was under sentence in the house of correction.

The Court held the indenture void and that the action could be maintained, notwithstanding the fact that he formerly might have received public assistance, Mr. Justice Morton saying: "The parents were not *actually chargeable to the town when the indentures were made, and the fact that they or one of them had before been assisted by the town is not sufficient. A man whose self or wife has once partaken of municipal charity is not forever after liable to have his children bound out to service.*"

Was the plaintiff then on the date of that indenture disqualified as a voter on account of the public assistance previously rendered him?

In the case of Bardwell *v.* Purrington, 107 Mass. 419, under substantially the same statute provision, the Court applied the same test. As the evidence showed that the town was, at the date of the indenture, actually, with the father's consent, supporting two of his minor children, he being unable to do so, the Court held the indenture valid, because, says the Court, "the father was still (at the date of the indenture) a person receiving aid and support from the public under the provisions of the statutes for the maintenance of the poor."

These cases very clearly show that the disabilities imposed upon paupers continue so long, and only so long, as the persons are actually paupers. The moment that the condition changes or ceases these disabilities cease.

There are several cases in the Reports, where towns have sued persons to recover the amount of assistance given them at some previous period. The first case, Inhabitants of Deer Isle *v.* Eaton, 12 Mass. 328, was a somewhat singular one. The town had furnished assistance to a woman, when sick. She afterwards married, and the town sued the husband for the amount of support so given. The Court, however, relieved the embarrassed husband by deciding that the liability of the town to furnish such support, being created by the statute, there was no contract, express or implied, existing between the town and the pauper. "If no debt existed at the time," says Chief Justice Parker, "none could arise afterwards in consequence of a change of circumstances in the pauper."

The act of 1817, giving towns such a right of action, was passed undoubtedly in consequence of this decision, but was repealed by the Revised Statutes of 1836.

See Medford *v.* Learned, 16 Mass. 215; Groveland *v.* Medford, 1 All. 23; and Stow *v.* Sawyer, 3 All. 515.

These cases certainly assume that a person at one time dependent upon public charity, so as to become a pauper, does not necessarily continue so, but may afterwards acquire property, or be in a position to reimburse the town for the previous support. There is nothing, in fact, in the reported cases that will support the present popular delusion that, so far as the right to vote is concerned,—"once a pauper always a pauper." It is as ill-founded in law as the exploded claim once asserted by England over her subjects: "Once a citizen always a citizen."

Our answer then to the question, When must a person be a pauper to come within the exception of the Constitution? is, that he must be a person receiving aid or assistance from the public at the time of registration; and the fact that he has at some period, during the year, received such assistance does not disqualify him as a voter. If he is not dependent upon the public, when he offers to register, and is otherwise qualified, he can vote; if he is then dependent, he cannot vote. If this position is correct, and a person to be disqualified within the meaning of the Constitution must be receiving public aid at the time of registration, it follows that the Legislature has no power to provide that a person who, before that period was a pauper, if he has then ceased to be such, shall come within the disqualification. No action by the Legislature is needed; if, at that time, he is a pauper, no legislative enactment is necessary to disqualify him; if he is not a pauper, no legislative enactment can disqualify him.

If the Legislature has no power to disfranchise such

persons, it follows *a fortiori* that boards of registration cannot assume or exercise such power.

The question remains, Who is to judge of the qualifications or disqualifications of voters?

A person while receiving aid and assistance from the public is disqualified by the Constitution, and his name should be omitted from the voting-lists by the proper authorities.

As has been seen, the Constitution fixes the qualifications, and the Court construes and defines them. The Legislature cannot directly or indirectly alter or enlarge them. But it can prescribe, in a reasonable and impartial manner, the mode in which the right of voting shall be asserted and exercised. And this it has done in various statutes, providing for the registration and preparation of lists of voters.

By the acts of 1874, ch. 60; 1874, ch. 376; 1875, ch. 188; 1877, ch. 235; the mayor and aldermen in cities (except Boston), the registrars in Boston, and the selectmen in towns shall prepare annually, at a certain time before election, lists of all qualified voters; and shall "receive up to a certain time, evidence of the qualifications of persons claiming a right to vote, and correct the lists."

Those bodies are, under these acts, the proper authorities to decide whether a person, claiming the right to vote, has the proper qualifications, but are to decide the question simply as matter of fact. What are the necessary qualifications, the Constitution and the Court declare as matter of law. Who possesses them, these boards will determine for the purposes of registration. But their decision is not final; there lies an appeal from it to the Court and a jury; they act upon their own responsibility; if they refuse to put upon the

voting-list the name of a qualified voter, after a proper demand and tender of proof of qualification, they are personally liable to an action by the person aggrieved.*

In this way the rights of all are properly protected, and there is no need of legislative interference. The Court declares under the Constitution the necessary qualifications in the abstract; the Legislature provides the manner in which those having them shall exercise and enforce their right of voting; and the properly appointed authorities determine in each case, upon their own responsibility, who is a qualified voter.

* In this Commonwealth, the Court has decided that if, though the duties of the boards of registration are both judicial and ministerial, yet it is not necessary for the maintenance of such action, to aver or prove, malice or wrongful intention, in so omitting the plaintiff's name from the voting-list. See Lincoln *v.* Hapgood, 11 Mass. 350; Blanchard *v.* Stearns, 5 Met. 298; Capen *v.* Foster, 12 Pick. 487; and Gates *v.* Neal, 23 Pick. 310.

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